IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

JANE DOE (Pseudonym), and All Others Similarly Situated,

Appellants

-vs-

EDWARD M. SEARS,

Appellee

File No. 79-6293

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBERS 35604 and 35647

JURISDICTIONAL STATEMENT

KENNETH G. LEVIN (Lead Counsel)
DENNIS GOLDSTEIN
PHILLIP A. BRADLEY

Attorneys for Appellant

151 Spring Street, N.W.
Atlanta, Georgia 30303
(404) 524-5811

Opinions Below (Rule 15(a))

The original rulings of the trial court herein, the Superior Court of Fulton County, Georgia, bore the style Sears v. The Atlanta Housing Authority, et al., and the number C-49692. These opinions are not, and will not be, reported. The rulings of the Supreme Court of Georgia in the appeal and cross-appeal from the trial court's judgment were styled Doe v. Sears and Sears v. Doe, and bore numbers 36504 and 35647, respectively. They are reported at 245 Ga. 83, _____ S.E. 2d. _____ (1980).

Statement of Jurisdiction (Rule 15(b))

This case originated as a state court mandamus action brought by Appellee Sears, the managing editor of the Atlanta Constitution, against the Atlanta Housing Authority (hereinafter AHA) and two of its officials. Appellee sought to require AHA to give him copies of certain otherwise confidential tenant records, relying upon the Georgia Open Records Act, Ga. Code Ann. §§40-2701 et seq. Three individual tenants, using pseudonyms, intervened as defendants and as representatives of all other AHA tenants whose records would be released if Sears' mandamus were granted. The trial court entered an order granting the relief sought in part and denying it in part, which order was modified on rehearing in a further order. Both Sears and the tenants appealed directly to the Georgia Supreme Court, which issued a consolidated opinion in the two appeals. The AHA did not appeal but agrees with the tenants' position. This appeal is brought from the Supreme Court's opinion and from its denial of rehearing of the decision therein.

The judgments sought to be reviewed are the Supreme Court of Georgia's original decision, dated January 3, 1980, and its denial of rehearing without opinion, dated January 23, 1980. The notice of appeal was filed in the Georgia Supreme Court on February 7, 1980.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(2).

To the extent (if any) that the statutory language is not absolutely clear that Appellant has a right of appeal, decisions of this Court such as Cohen v. Califano, 403 U.S. 15 (1971) make it plain that §1257(2) applies where a statute's unconstitutionality is not evident on its face, but presents itself "as construed to apply to the facts of this case" by the state's Supreme Court.

The statute of the state of Georgia whose constitutionality is involved in this appeal is known (unofficially) as the Open Records Act,

whose official citations are Ga. Acts 1959, pp. 88-9, Ga. Acts 1967, p. 455, as amended by Ga. Acts 1970, p. 163. It is codified as Ga. Code Ann. Chapter 40-27, consisting of three sections: Ga. Code Ann. §§40-2701, 2702 and 2703. The second of these three sections, Ga. Code Ann. §40-2702, deals only with the procedure for inspection of records covered by the act and the charges therefor, and has nothing to do with this appeal. We therefore set forth only the full text of the remaining two sections, which is as follows:

> All State, county and municipal records, except those, which by order of a court of this State or by law, are prohibited from being open to inspection by the general public, shall be open for a personal inspection of any citizen of Georgia at a reasonable time and place, and those in charge of such records shall not refuse this privilege to any citizen. Ga. Code Ann. §40-2701.
>
> The provisions of this Chapter shall not be applicable to records that are specifically required by the Federal Government to be kept confidential or to medical records and similar files, the disclosure of which would be an invasion of personal privacy. All records of hospital Authorities other than the foregoing shall be subject to the provisions of this Chapter. All State officers and employees shall have a privilege to refuse to disclose the identity of any person who has furnished medical or other similar information which has or will become incorporated into any medical or public health investigation, study or report of the Department of Human Resources. The identify of such informant shall not be admissible in evidence in any court of the State unless the said court finds that the identity of the informant already has been otherwise disclosed. Ga. Code Ann. §40-2703.

Questions Presented by This Appeal (Rule 15(c))

1. Where the individual files of tenants of federally-subsidized public housing contain personal information protected from public disclosure by federal and state constitutional rights of privacy,[1/] may the Georgia Open Records Act be construed, consistently with the Fourteenth Amendment's Due Process and Equal Protection Clauses, to require compelled disclosure of such private information on the theory that public housing tenants impliedly waive all their constitutional privacy rights merely by falling behind in their rent payments?

2. Must public housing tenants, as a condition of receipt of public benefits, be deemed to have surrendered valuable constitutional rights by implication merely because "the general public" "is concerned with whether or not public housing tenants are paying their rentals when due"?

[1/] as interpreted or assumed by the Georgia Supreme Court

Statement of the Case (Rule 15(d))

This appeal presents important questions of implied waiver of constitutional rights by public benefits recipients. It arises in the context of a thus-far successful effort by a major Atlanta newspaper to compel disclosure by the Atlanta Housing Authority of certain personal and private tenant records pursuant to Georgia's Open Records Act. The Georgia Supreme Court has held that although the United States and Georgia Constitutions would protect such records from forced disclosure against the wishes of most Georgians, public housing tenants, merely by their status as such, impliedly surrender all such important rights the moment they fall in arrears in their rental payments. This ruling sets a dangerous precedent for the tens of thousands of Georgia residents who, under this ruling, must now choose between giving up public funding to meet the necessities of life, or giving up important constitutional rights.

In the spring of 1979, Appellee Sears, managing editor of the Atlanta Constitution (Atlanta's principal morning newspaper), requested of officials of the Atlanta Housing Authority that they permit him to inspect and copy certain of their business records, purportedly pursuant to Georgia's so-called "Open Records Act," Ga. Code Ann. Chapter 40-27. Specifically, Sears requested records showing, as of December 1977 and December 1978, the names, addresses, sources of income, and amount and period of rental delinquency, of all Atlanta Housing Authority tenants who were shown in AHA records as being in arrears in rent at those times. The Authority denied the request on several grounds, including one relevant to this appeal, namely, that such disclosure would violate the privacy rights of the affected tenants and might thereby subject the Authority to liability for damages. The Authority did offer to supply the requested information with names and addresses edited out. Being dissatisfied with their response, Sears brought a mandamus action against the Authority and two of its officials in the Superior Court of Fulton County, Georgia, contending that the Authority had an affirmative duty under the Open Records Act to comply with this request.

These proceedings quickly came to the attention of various tenants of the Atlanta Housing Authority, including a number whose records were among those requested by Sears. Three such tenants, individually and as representatives of a class of all similarly situated AHA tenants, moved to intervene as defendants in order to assert for themselves their constitutional and statutory rights to privacy in the records. Their motion to intervene and for certification of a class was granted by the trial court. Defendants (the Authority and the tenants) then filed a motion to dismiss on the ground that the records sought did not come within the ambit of the Open Records Act at all.

By his orders of May 29 and July 17, 1979, the trial court both denied Defendants' motion to dismiss, and made a ruling on the merits that was partially favorable to the Plaintiff and partially favorable to the Defendants.[2/] He found that although the Open Records Act was intended to cover the records here in question, the exception of records "the disclosure of which would be an invasion of personal privacy" from Ga. Code Ann. §40-2703 was intended to include all information protected by rights of privacy under the United States and Georgia Constitutions and that these particular records were so protected. He went on to hold, however, that any tenant who fell behind six or more months in rental payments had, for that reason alone, impliedly waived all his rights to privacy in the records, constitutional or otherwise. On that basis, he held that Sears was entitled to access to those records regarding tenants six or more months in arrears in rent, but not to those with less than six months' arrearages.

[2/] The original ruling on the merits was based upon the court's mistaken belief that the parties had stipulated as true a large number of "facts" that had been reported in a news story in the Atlanta Constitution. When that error was brought to the trial court's attention, he modified the original order by a further order dated July 17, 1979, which, while deleting many of the original findings of "fact," reached the same conclusion as a matter of law.

An appeal and a cross-appeal were then taken to the Georgia Supreme Court. Sears argued primarily that the trial court erred in finding the tenant records were protected by any right of privacy, constitutional or otherwise. The tenants argued primarily that the trial court erred in finding the records subject to the Open Records Act at all, and that no decision on any waiver of their rights of privacy could properly have been made without an evidentiary hearing on the issue of such purported waiver. The Authority did not itself appeal, inasmuch as the tenant intervenors were asserting the same legal positions that it would have, and, in a sense, had stronger interests in making the arguments than the Authority did. However the Authority, though no longer a party, has co-operated with and supported the tenants in their appeals and continues to do so. Both the tenants and Sears discussed the issue of waiver in their briefs, but this was not done at great length because neither party, apparently, expected the Georgia Supreme Court's opinion to turn on that particular issue.

The Georgia Supreme Court decided the appeal on January 3, 1980. They first affirmed the trial court's finding that the records sought were subject to the Open Records Act. They also affirmed the trial court's finding that Ga. Code Ann. §40-2703 was meant to exempt from disclosure all records that would be protected under constitutional or other rights of privacy, saying:

> Properly construed, the section forbids disclosure to the general public from AHA records or files of any information which would invade the constitutional, statutory or common law rights of the tenants to privacy.

Finally, they assumed that these particular records contained constitutionally-protected information, but rested their decision on an implied waiver of any such rights, just as the trial court had done.

Specifically, the Georgia Supreme Court assumed, for the purposes of its decision, that the records sought came within the ambit of the right of privacy protected by the U.S. Constitution, the Georgia Constitution, and Georgia statutory and common law. Relying, then, on a line of Georgia cases that do not treat constitutional rights and do not involve compelled disclosure to third parties, they held that the tenants impliedly waived any rights to privacy by any rent arrearage, however small or short in duration. Their specific ruling was:

> This court holds today that the general public properly is concerned with whether or not public housing tenants are paying their rentals when due. Accordingly, we hold that each of the tenants impliedly waived whatever constitutional, statutory or common law rights of privacy he may have had in the status of his rental account and the amounts and sources of his income when he allowed his rental account to become unpaid when due.

They then ordered all of the requested records of the entire class of tenants disclosed to Sears on the basis of this supposed implied waiver.

Appellants filed a motion for rehearing in the Georgia Supreme Court, addressed solely to the Constitutional question of implied waiver as raised by the Court's interpretation of the Open Records Act. They argued that the Supreme Court's opinion raised very serious questions under the Due Process Clause of the 14th Amendment to the United States Constitution, since this Court has held that questions of waiver of federal constitutional rights are themselves subject to federal constitutional standards, and that these federal standards require a "knowing and intelligent waiver." Appellants argued that to interpret the Open Records Act to mandate disclosure of otherwise constitutionally-protected private information purely on the basis of an arrearage in rent, with no finding either that the tenants knew such right existed or that they had actually even appeared to waive it, would render the Open Records Act violative of the 14th Amendment's Due Process Clause. After considering that argument, the Georgia Supreme Court denied the motion for rehearing without opinion on January 23, 1980.[3/]

[3/] Attached to this jurisdictional statement, in addition to the documents specifically required to be attached by this Court's Rule 15, is a copy of the Motion for Rehearing and supporting brief filed by Appellants in the Georgia Supreme Court. This document most clearly shows the manner in which the federal constitutional question was presented to that court, and, as a corollary, the fact that the Georgia Supreme Court necessarily rejected that argument by its denial of the motion.

Substantially of Federal Questions (Rule 15(e))

This Court has long viewed the issue of purported waiver of constitutional rights as a matter of great importance, worthy of close scrutiny, since Constitutional rights are of such importance in our system of government. Though it has been many years since this Court has treated the issue in any detail in a civil case, many of this Court's decisions have held that

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 748 (1970).

Among these cases are: Fay v. Noia, 372 U.S. 391, 439 (1963), Johnson v. Zerbst, 304 U.S. 458, 464 (1938), Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937), Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 307 (1937), Barker v. Wingo, 407 U.S. 514, 525-6 (1972), Fuentes v. Shevin, 407 U.S. 67 (1972), and see D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174 (1972) and Swarb v. Lennox, 405 U.S. 191 (1972).[4/] Furthermore, this Court has quite clearly held that the question of waiver of constitutional rights is itself "a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966), Fay v. Noia, supra.

The right of privacy in tenants' personal files that the Georgia Supreme Court found so easily waivable[5/] is one with which the United States Congress (as well as many states) has been particularly concerned in recent years. The Privacy Act of 1974, 5 U.S.C. §552a, and the exception from disclosure of private information from the Freedom of Information Act, 5 U.S.C. §552(b)(6), are the two most notable federal examples of this concern. The records involved here, although they are not technically such federal agency records as come within the coverage of the Privacy Act, are difficult to distinguish from federal records as a matter of policy, for the public housing authorities receive considerable federal funding and keep most of their records in accordance with directions from the United States Department of Housing & Urban Development. As far as Appellants are concerned, the records might just as well be kept directly by the Department of HUD (and therefore be subject to the Privacy Act) instead of by an authority acting for that Department. The point is, therefore, that the compelled disclosure to the general public of private, federally-supervised records is a matter of considerable concern under present federal public policy.[6/]

Even compliance by Appellee with this Court's cases disfavoring implied waivers of constitutional rights would be inadequate to fully protect Appellants' constitutional privacy rights, in light of another important line of cases from this Court brought into play the Georgia Supreme Court's ruling. These cases prohibit the conditioning of receipt of public benefits upon actual waiver of constitutional rights, and suggest the unlikelihood that Georgia could constitutionally require such an actual waiver by its public housing tenants. As early as 1926, this Court held that although the state may grant a privilege "upon such conditions as it sees fit to impose,"

> ...the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one consitutional right as a condition of its favor, it may, in a like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. Frost v. Railroad Commission of the State of California, 271 U.S. 583, 593-4 (1926).

A number of this Court's cases of more recent vintage have reaffirmed

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[4/] See also Vance v. Terrazas, 48 USLW 4069, _____ U.S. _____ (1980).

[5/] The existence vel non of such a right in this context is not now presented to this Court, inasmuch as the Georgia Supreme Court has not yet decided whether or not it exists under either the United States or the Georgia Constitution (but has only assumed that it does).

[6/] Open records and similar acts are a comparatively recent phenomenon. The inherent tension between policies of public disclosure and protection of personal privacy raises important questions for future decision. But the Georgia Supreme Court's resort to a waiver theory to avoid (not resolve) this tension raises even more serious problems. Your Appellants seek not a narrow reading of public disclosure rights, but rather a narrow reading of implied or coerced waivers of such constitutional rights as do exist.

the principle that receipt of public benefits may not "be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action." Keyishian v. Board of Regents, 385 U.S. 589, 605-6 (1967), and see Sherbert v. Verner, 374 U.S. 398 (1963), Slochower v. Board of Higher Education, 350 U.S. 551 (1956), Shelton v. Tucker, 364 U.S. 479 (1960) (and see Branti v. Finkel, 48 USLW 4331, 4333 (1980)). Even more recently, this Court said:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons...It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests..." Perry v. Sindermann, 408 U.S. 593, 597 (1972),

quoted with approval in Judge (now Justice) Stevens' opinion in Illinois State Employees Union etc. v. Lewis, 473 F.2d 561, 571 (7th Cir., 1972), cert. den. 410 U.S. 943 (1973), and in the opinion of the court in Tygrett v. Washington, 543 F.2d 840, 846 (D.C. Cir., 1974).[7/]

Enforcement of this doctrine is especially important to persons, such as Appellants, who because of their poverty are dependent upon public benefits for one of the necessities of life. Appropriately enough, therefore, low-rent public housing tenants form one of the earliest classes of benefits recipients to successfully assert in court their right to public housing tenancy free from the obligation to waive important First Amendment rights. Such cases include Lawson v. Housing Authority of the City of Milwaukee, 70 N.W.2d 650 (Wisc., 1955), cert. den. 350 U.S. 882 (1955), Chicago Housing Authority v. Blackman, 122 N.E.2d 522 (Ill., 1954), and Housing Authority of the City of Los Angeles v. Cordova, 279 P.2d 215 (Cal. App., 1955), cert. den. 350 U.S. 969 (1956) ("...the government...cannot...make the privilege of [occupying public housing] dependent upon conditions that would deprive any of its citizens of their constitutional rights,", 279 P.2d at 218). More recently, Justice Douglas explicitly mentioned "a home in a public housing project" as a governmental benefit whose enjoyment may not be conditioned upon the forfeiture of a constitutional right. Thorpe v. Housing Authority of the City of Durham, 386 U.S. 670, 674, 678-9 (1967; Douglas, J., concurring).

The Georgia Supreme Court's ruling thus is inconsistent with two important doctrines enunciated by this Court, namely disapproval of implied waivers, and of granting of benefits on condition of actual waiver, of constitutional rights. Its impact upon Georgia citizens, especially the less economically fortunate ones who must depend upon public benefits for necessary or important life requirements, will indeed be drastic unless reversed by this Court. Not merely public housing tenants (though there are a sufficient number of those to cause much concern), but also patients of public hospitals and clinics, recipients of unemployment compensation benefits, food stamp users, and a great many others, few of whom in all likelihood ever conceived that their names, addresses, sources of income, and amounts of money owed and in arrears, might be published in the daily newspaper for all to read, now face that possibility as a consequence of mere inability to pay a bill timely to such a creditor.[8/] Your Appellants--a group large enough for immediate and unquestioned class certification--are so threatened at this very moment. Such an infringement of federal constitutional rights indeed presents a substantial federal question within the parameters established by this Court.

[7/] Other important federal appellate decisions treating this issue include Smartt v. Avery, 370 F.2d 788, 790 (6th Cir., 1967), Patton v. State of North Carolina, 381 F.2d 636, 640 (4th Cir., 1967), Cole v. Housing Authority of the City of Newport, 435 F.2d 807, 810 ftn. 9 (1st Cir., 1970), Spence v. Bailey, 465 F.2d 797, 799 (6th Cir., 1972) (opinion by Justice Clark, retired), Haswell v. United States, 500 F.2d 1133, 1147 (Ct. Cl., 1974) (dictum), Boorda v. Subversive Activities Control Board, 421 F.2d 1142 (D.C. Cir., 1969), and United States v. Brown, 501 F.2d 146 (9th Cir., 1974).

[8/] This specific consequence directly attends recipients of unemployment or food stamp benefits only to the extent they may allegedly receive "overpayments" having to be repaid, for "the general public" is no doubt equally "concerned with whether or note [other] public [benefits recipients] are [re]paying their [overpayments] when due." This logic of the Georgia Supreme Court's opinion would apply to all such recipients, however, provided only that a Georgia citizen decided "the general public" "is concerned with whether or not" people might be too easily approved for such benefits, or might be receiving favoritism of some sort, or many other easy-to-assert speculations, and demanded disclosure of personal records on that basis.

Conclusion

For the reasons hereinbefore stated, this case lies within the mandatory appellate jurisdiction of this Court and presents substantial and important constitutional questions. The Court should therefore note probable jurisdiction and set the appeal down for briefing and oral argument.

Respectfully submitted,

KENNETH G. LEVIN

DENNIS GOLDSTEIN

PHILLIP A. BRADLEY

Attorneys for Appellants

151 Spring Street, N.W.
Atlanta, Georgia 30303
(404) 524-5811

IN THE SUPREME COURT OF THE UNITED STATES

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JANE DOE (Pseudonym), and All Others Similarly Situated,

Appellants

-vs-

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Appellee

File No. 79-6393

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBERS 35604 and 35647

ATTACHMENTS TO JURISDICTIONAL STATEMENT

KENNETH G. LEVIN (Lead Counsel)
DENNIS GOLDSTEIN
PHILLIP A. BRADLEY

Attorneys for Appellant

151 Spring Street, N.W.
Atlanta, Georgia 30303
(404) 524-5811

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In the Supreme Court of Georgia

Decided: JAN 3 1980

35604. Doe et al. v. Sears

35647. Sears v. Doe et al.

NICHOLS, Chief Justice

The issues in this appeal and cross-appeal are whether the Open Records Laws, Code Ann. §40-2701, et seq., apply to the Atlanta Housing Authority and, if so, whether certain tenants of the authority have an unwaived constitutional, statutory, or common law right of privacy that would be infringed upon by disclosure of records which identify those tenants and state the amounts they owe as unpaid rents.

The issues arise as a result of investigative reporting by The Atlanta Constitution, a daily newspaper. Edward M. Sears, Jr., as a citizen and as managing editor of the newspaper, asked permission under the Open Records Laws to inspect certain computer print-outs kept by the AHA as part of its business records. The print-outs contain the names, addresses, sources of income and rents owed by tenants.

Sears' stated purpose for inspecting the print-outs was to determine if certain public housing tenants had received special favors or treatment in regard to rent delinquency, if those tenants had personal or political ties and connections with public officials or AHA staff or directors, and if there was a pattern of favoritism between certain housing project management personnel and certain tenants.

AHA agreed to make the records available for inspection but only after they had been edited to delete all tenants' names and addresses.

Sears then filed his petition for the writ of mandamus. AHA answered, contending that such records were not subject to inspection pursuant to the Open Records Laws and that to permit such inspection would violate the privacy of AHA tenants and subject AHA to liability to its tenants for such disclosure.

Jane Doe, Mary Roe and Ann Poe, fictional names of three tenants of AHA, individually and on behalf of a class of other tenants who were or who had been delinquent in rent payments, were allowed to intervene.

After submission of briefs and stipulatons of facts, the trial court held that the records were public records subject to the Open Records Laws. The court also held, applying a balancing test, that tenants whose rents were unpaid for six months or more and who had not paid all or substantially all of those delinquent rents prior to the filing of Sears' petition had waived their rights of privacy. The AHA was ordered to reveal to Sears their names, addresses and the periods and amounts of their delinquencies. The AHA was ordered to reveal to Sears the delinquent rents, periods of delinquency and housing project locations of all other delinquent tenants but not their names and addresses. The cut-off period of six months apparently was predicated upon a finding of fact that "the normal AHA practice was to commence eviction proceedings against a tenant if no payment of delinquent rent was made by a tenant after five months."

In case number 35604, defendant-intervenors appeal. In case number 35647, Sears cross-appeals. This court affirms in part and reverses in part in the appeal and the cross-appeal.

1. There can be no doubt but that the Atlanta Housing Authority falls within the ambit of the Open Records Laws. Code Ann. §40-2701, et seq. The AHA is a public body corporate and politic created as a result of statute. Code Ann. §§99-1102,

1103, 1116. It is governed by a board of commissioners appointed by the mayor. Code Ann. §99-1110. The authority exercises public and essential governmental functions, and its property is, by law, public property. The low-cost housing which the AHA provides constitutes a public use and purpose for which public monies are spent. The entire character of the AHA is public.

Doe, et al. argue that amendments to Code Ann. §40-2703 show legislative intent that the Open Records Laws shall not apply to any authority other than a hospital authority. To the contrary, these amendments quite obviously were enacted at least in part to remove all doubt that could exist as to whether all records of hospital authorities are included within the classes of records which are not open to public inspection. The underlying implication of Code Ann. §40-2703 as amended is that all records of all state, county and municipal authorities are open to public inspection unless closed by a specific exception, and that the records of hospital authorities are not in any respect different from those of other authorities when the issue is one of whether the particular record is open to public inspection under the general provisions of the Open Records Laws or is closed to public inspection under a specific statutory exception. See, Griffin-Spalding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444 (241 SE2d 196) (1978).

The trial court correctly held that the records of the AHA fall within the Open Records Laws.

2. Having determined that AHA records are open records, this court next faces issues as to whether the defendant-intervenors have federally or state created or protected rights of privacy which would be infringed upon were Sears to be furnished their names, addresses, and the amounts of their rent arrearages.

In Griffin-Spalding County Hospital Authority v. Radio Station WKEU, supra, this court held that a hospital authority properly could delete confidential information from records that otherwise were public before making such records available for a citizen's inspection. To the same effect: Brown v. Minter, 243 Ga. 397 (SE2d) (1979).

The parties have filed extensive briefs calling upon this court to delimit with precision the full extent of the federal and state constitutional rights of privacy, if any, and state statutory and common law rights of privacy, if any, as to the tenants' rent accounts with AHA. The Open Records Laws exempt from disclosure, among other records, "medical records and similar files, the disclosure of which would be an invasion of personal privacy." (Emphasis added.) Code Ann. §40-2703. Whatever may be the outside limits of the rights of personal privacy to which that section refers, this court cannot accept Sears' contention that "similar files" must relate in some respect to the history, diagnosis, treatment, prognosis or result of disease or other medical condition. Properly construed, the section forbids disclosure to the general public from AHA records or files of any information which would invade the constitutional, statutory or common law rights of the tenants to privacy. See, Brown v. Minter, 243 Ga. 397 (SE2d) (1979). These personal privacy rights can be adequately protected, however, by separating the information which must be disclosed from that which must not be disclosed and by keeping the latter information confidential. Griffin-Spalding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444 (241 SE2d 196) (1978).

The full extent of the tenants' rights of privacy regarding the status of their rental accounts is an issue not presented because this case must be decided by an

application of the doctrine of waiver of right. As a general rule, a person's right of privacy may be waived in whole or in part, expressly or by implication, by his own actions or words or by those of persons who are authorized by him or by law to act in his behalf. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 191(8), 199 (50 SE 68) (1904).

Because the law continues to protect a person's right of privacy to whatever extent it has not been waived, "the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver." 122 Ga. at 199. A partial waiver of the right of privacy may be implied from the act of accepting credit from another. Gouldman-Taber Pontiac v. Zerbst, 213 Ga. 682 (100 SE2d 881) (1957); Haggard v. Shaw, 100 Ga. App. 813, 818 (112 SE2d 286) (1959). Where a person "seeks and obtains credit from . . . [another person] she may expect the creditor to investigate her and her reputation, particularly for paying her bills, to ascertain for whom she works, and to communicate with her employer for information about her. She may expect her employer to want her to pay her bill, and may further expect her creditor to use reasonable means to persuade her to do so, and on failure to persuade to force her to do so through the courts. When she accepts the credit, she impliedly consents for her creditor to take all reasonable and necessary action to collect the bill." 213 Ga. at 684. Going into debt subjects the debtor "to the standard communications of a civilized society." Davis v. General Finance and Thrift Corp., 80 Ga. App. 708, 711 (57 SE2d 225) (1950). These decisions establish beyond all cavil the principle that a tenant in default under his lease impliedly consents to reasonable and necessary disclosures of his arrearage and his financial condition to those who

who properly are concerned with whether or not the rental account is current, and who could assist the landlord to get the rental account current without recourse to the courts.

Employers have been held to be persons properly concerned with the status of their employees' debts. Gouldman-Taber Pontiac v. Zerbst, supra; Haggard v. Shaw, supra. This court holds today that the general public properly is concerned with whether or not public housing tenants are paying their rentals when due. Accordingly, we hold that each of the tenants impliedly waived whatever constitutional, statutory or common law rights of privacy he may have had in the status of his rental account and the amounts and sources of his income when he allowed his rental account to become unpaid when due.

The fact that the AHA may have extended to all or to some tenants a period of grace during which accounts could be paid without the initiation of dispossessory proceedings is without relevance. The trial court should have required disclosure by the AHA of the names, addresses, sources and amounts of income and the periods and amounts of the rental delinquencies of all tenants whose rental accounts were in arrears on the date that Sears' petition was filed.

3. The tenants cannot complain that the trial court decided the issues on briefs rather than after an evidentiary hearing since they raised no objection to the manner in which the issues were presented to the court for decision until after entry of the court's order.

Judgment affirmed in part and reversed in part in the appeal and the cross-appeal. ~~All the Justices concur.~~ Nahmias, P. J. Gordon, Hill, Benham, Marshall, J. J. and Judge Evans [illegible] concur. Clarke, J. not participating.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA JAN 23 1980

The motion for a rehearing was denied today:

Case No. 35604 Doe et al. v. Sears et al

Case No. 35647 Sears et al. v. Doe et al.

Nichols C. J., Undercofler, P. J., Jordan, Hill, Gunter & Marshall, JJ., and Judge Charles L. Weltner concur. Clark, J., not participating.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

EDWARD M. SEARS, JR. Plaintiff	)	
	)	CIVIL ACTION
Vs.	)	
	)	FILE NO. C-49692
THE ATLANTA HOUSING AUTHORITY, BERNARD PARKS, as Interim Director of the Atlanta Housing Authority; and JAMES HATCH, as Finance Director of the Atlanta Housing Authority, Defendants	)	
JANE DOE, MARY ROE and ANN POE, Individually and on behalf of all other similarly situated, Intervenor-Defendants	)	

ORDER

The within and foregoing application for Writ of Mandamus having come on regularly to be heard and after receiving evidence, briefs and argument of counsel, the Court makes the following findings of fact:

I.

FINDINGS OF FACT

1.

Edward M. Sears, Jr. is a citizen of the State of Georgia, a resident of the City of Atlanta, and Managing Editor of the The Atlanta Constitution.

2.

On November 21, November 22, November 30, December 21, December 22 1978, and January 5 and 8, 1979, The Atlanta Constitution ran a series of articles regarding the Atlanta Housing Authority, its officers, directors, employees and tenants. (Exhibits A, B, C, D, E, F and G)

3.

The Atlanta Housing Authority is a public body corporate, politic organized and existing under the laws of the State of Georgia and the ordinances of the City of Atlanta.

4.

Mr. Bernard Parks is the Interim Executive Director of the Atlanta Housing Authority and Mr. James Hatch is the Finance Director of such organization.

5.

Jane Doe, Mary Roe and Ann Poe, individually and on behalf of a class of other similarly situated persons are tenants in a public housing development owned and operated by the Atlanta Housing Authority and are or have been in the past delinquent in the payment of rent and other charges to the Atlanta Housing Authority.

6.

Mr. Sears seeks to obtain from the Atlanta Housing Authority certain records for December, 1977, and December, 1978, which show delinquent rents owed on computer print-out; the tenant's name and address, the period of delinquent rent, and the source of such tenant's income.

7.

Such information is contained on computer print-outs known as:

(a) "Accounts Receivable Delinquency Register" December 1977;

(b) "T. A. 009" December 1977;

(c) "Accounts Receivable Delinquency Register" December 1978;

(d) "T.A. 009" December 1978;

(e) "High Value List Register" December 1977;

(f) "T.A. 009 HV" December 1977;

(g) "High Value List Register" Dèbember 1978;

(h) "T.A. 009 HV" December 1978.

8.

Such foregoing records were made and kept in the ordinary course of business and contain personal data about the tenants of the Atlanta Housing Authority such as source of income, delinquent rent, name, and address.

9.

Mr. Sears made a request to examine such documents pursuant to Georgia Laws 1959, p. 88, as amended (Ga. Code Annotated Section 40-2701 et seq.) at the offices of the Atlanta Housing Authority during its business hours.

10.

The Atlanta Housing Authority denied inspection of such documents in an unedited form on the grounds that such records were not subject to open inspection to the general public pursuant to Ga. Code Ann. §40-2701 et seq.

11.

The Atlanta Housing Authority further declined to permit inspection on the grounds that such inspection "would not only violate the privacy rights of their tenants, but may subject Defendants to liability to said tenants for such disclosure."

12.

Mr. Sears stated purpose for requesting such information in an unexpurgated form was to determine if certain public housing tenants had received special favors or treatment in regard to rent delinquency, if such tenants had personal or political ties and connections with public elected officials or Atlanta Housing Authority staff and directors, and if there was a pattern of favoritism between certain housing project management and certain tenants as part of the ongoing investigative reporting regarding the Atlanta Housing Authority.

13.

Mr. Sears had good reason to believe that favoritism in treatment of certain tenants was occurring based upon statements made by Atlanta Housing Authority board member Jasper Dorsey (Exhibit F), and by non-voting tenant member of the Authority's Board of Commissioners Mrs. Rebecca English that her six-month delinquency in rent in 1978 was not the only case to be looked into because

the Atlanta Housing Authority had taken no steps to collect or to evict her. (Exhibit F).

14.

The Department of Housing and Urban Development had protested the Atlanta Housing Authority's rent collection practices which allowed an aggregate tenant indebtedness to the Atlanta Housing Authority for rent to accrue of $367,546.00. (Exhibits F and G).

15.

The normal Atlanta Housing Authority practice was to commence eviction proceedings if no payment of delinquent rent was made by a tenant after five months. (Exhibit E).

16.

The class represented by Jane Doe, Mary Roe and Ann Poe has asserted that their rights of privacy, both under common law and the United States Constitution, will be invaded should the disclosure of the requested information be made available to Mr. Sears and possible subsequent publication.

17.

Although the Atlanta Housing Authority has taken the position that such requested information raised issues of invasion of privacy, and that disclosure might expose it to liability to third persons by a disclosure of information regarding such third persons' rights of privacy, the Atlanta Housing Authority has not asserted that such rights of privacy are its own and cannot adequately represent such third persons and in fact has a conflict of interest with such third persons to whom it may be liable if it unlawfully aided in the invasion of such rights of privacy.

18.

Jane Doe, Mary Roe and Ann Poe individually and as a class possess rights of privacy, which a disclosure of their actual identity would irreparably harm and such class is adequately represented through such anonymous additional parties defendant, Jane Doe, Mary Roe, and Ann Poe.

19.

This action for Writ of Mandamus is appropriate in that Edward M. Sears, Jr. has no other specific remedy at law and that the Atlanta Housing Authority, Bernard Parks and James Hatch are either public officials or public corporation.

II.

CONCLUSIONS OF LAW

1.

The application for Writ of Mandamus sets forth an actual controversy arising under Georgia Laws 1959, p. 88, as amended (Georgia Code Annotated §40-2701 et seq. subject to mandamus Houston v. Rutledge, 237 Ga. 764 (1976); Northside Realty Assoc., Inc. v. Community Relations Comm. of Atlanta, 240 Ga. 432 (1978); Griffin-Spalding County Hospital Authority v. WKEU, 240 Ga. 444 (1978); and Brown v. Minter, Ga. (1979) File No. 34397.

2.

The Atlanta Housing Authority, Bernard Parks as Interim Executive Director and James Hatch as Finance Director are subject to an action for Write of Mandamus as an authority or public corporation. Griffin-Spalding County Hospital Authority v. WKEU, 240 Ga. 444 (1978).

3.

Jane Doe, Mary Roe and Ann Poe set forth justifiable reasons sufficient to be permitted to intervene in an existing lawsuit as anonymous parties and nothing contained in Sections 10(a) or 24(c) of the Civil Practice Act (Georgia Code Annotated §§81A-110(a) and 81A-124)c) prevents the Court in its sound exercise of discretion to permit such concealment of identity when no party is harmed thereby; Rowe v. State of New York, 49 F.R.D. 279 (S.D.N.Y., 1970) is in nowise persuasive, since it dealt with the filing of a lawsuit by anonymous parties and not the intervention by anonymous parties.

4.

The Court finds that Jane Doe, Mary Roe and Ann Poe, individually and on behalf of all other similarly situated are permitted to intervene as additional parties defendants under Civil Practice Act Section 24(a)(2)[Georgia Code Annotated §81A-124(a)(2)] as a matter of right because the applicant's interests are not adequately represented by existing parties and an unfavorable disposition of the action may as a practical matter impair their rights of privacy unless made a party. Brown v. Truluck, 239 Ga. 105, 106 (1977); Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 517 (1972).

5.

The threshold question to a resolution of the Writ of Mandamus on the merits is a determination of whether or not the records sought come within the ambit of Georgia Laws 1959, p. 88 (Georgia Code Annotated §40-2701 et seq.) as public records. Despite the contentions of the parties to the contrary, it has not been admitted that these are public records merely that such records were kept in the ordinary course of business by a quasi-public corporation. In City of Atlanta v. Hawkins, 45 Ga. App. 847, 850(3) (1932) the Court held that certain water-meter books kept by the city water-meter inspector were not such public records as could be examined to disprove repair on the water-meter. In Brusnighan v. State, 86 Ga. App. 340, 349, 350 (1952) held certain letters and minutes of the Insurance Commissioner came within the meaning of public records (Georgia Code Annotated §56-101 now 56-201 through 56-2[illegible]) and were within the prohibition of Georgia Code Annotated §89-9903 pertaining to public records. "While Code §89-9903 states several offenses, it is clear that, in view of the language of the section itself, it was enacted as a protection along to records, books, papers, etc., belonging to public offices within this state. It was originally codified in the act of 1833, in the eighth division of the Penal Code with 'Crimes against Public Justice' and along with crimes dealing with public officers; and while some of the documents named could be either public or private instruments, all of those specified are either public or capable of becoming public records."

The Attorney General of Georgia in construing the "Inspection of Public Records Act" has uniformly taken a narrow and restrictive interpretation. The Attorney General cites Linder v. Eckard, 152 N.W. 2d, 833, 836 (1967):

> "We prefer the narrower and more prevalent view that a public record or writing is one which an officer is required by law to keep or which is intended to serve as a memorial and evidence of something written, said or done by the officer of public agency." See 45 Am.Jur. 420 Records and Recording Laws, §2.

The Attorney General also cites People v. Olson, 42 Cal. Rptr. 760, 764-765 (1965) for his narrow view:

> "A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference."

The Attorney also cites 76 C.J.S. Records §1:

> "[O]ne required by law to be kept; or necessary to be kept in the discharge of a duty imposed by law . . . or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office."
>
> . . .
>
> "All records which the law requires public officers to keep, as such officers, are public records . . . "

The opinions of the Attorney General which are applicable to this point appear in Opinions of the Attorney General, Op. 77-56; Op. 76-126, UP 76-43; UP 75-92; Op. 73-55; UP 71-9; Op. 70-213; UP 68-500, 68-507.

The General Assembly for good and sound public policy reasons has chosen to use a broader meaning for public records than used outside of Georgia Laws, 1959, p. 88. The clear public policy reasons are to permit a citizen reasonable access to information that may affect him and to information which may disclose public official and bureaucratic mismanagement, delay, waste, inefficiency, misfeasance, non-feasance, criminal conduct, favoritism, nepotism, as well as the good and proper administration of government. The Statute clearly states:

> "All State, County and Municipal records, except those which by order of a Court of this State or by law, are prohibited from being open to inspection by the general public, shall be open for a personal inspection of any citizen of Georgia at a reasonable time and place, and those in charge of such records shall not refuse this privilege to any citizen."

The language can hardly be more clear, precise and broad than this in scope. The General Assembly did not use the limiting words here "public records" but all records of the State, County and Municipality.

The Georgia Supreme Court in Houston v. Rutledge, 237 Ga. 764, 765 (1976) has given the statute the broad scope intended by the General Assembly in its holding:

> "We therefore conclude that documents, papers and records prepared and maintained in the course of the operation of a public office are 'public records' within the meaning of this statute, and it is immaterial that such documents, papers and records were not required to be prepared and maintained pursuant to a statute or ordinance."

In accord Northside Realty Assoc., Inc. v. Community Relations Commission of the City of Atlanta, 240 Ga. 432 (1978); Griffin-Spalding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444 (1978); Brown v. Minter, ____ Ga. _____ (1) (1979).

The Court accordingly finds that the requested records to be public or municipal records of a public corporation.

6.

The Court must next weigh and balance the public interests in disclosure versus non-disclosure of these public records. "[T]he trial court must weigh factors militating in favor of inspection (i.e., the interest of these appellants as citizens of Georgia in knowing what their government officials are doing) against factors militating against inspection (i.e., whether this would unduly disrupt the commission's investigation of discriminatory housing practices). In this regard, the court must weigh the benefits accruing to the government from nondisclosure against the harm which may result to the public if such records are not made available for inspection by the appellants." Northside Realty v. Community &c Comm., 240 Ga. 432, 435-436 (1978).

Since the records deal with the periods December of 1977 and 1978 there would appear not to be the possibility of interference with unfinished or ongoing investigations as in Houston v. Rutledge, Northside Realty Assoc., Inc. v. Community &c Comm., and Brown v. Minter as an interest consideration for the Atlanta Housing Authority, the owner and custodian of the records.

The Atlanta Housing Authority does have a clear interest and duty under Georgia Code Annotated §40-2702 "to preserve the confidentiality of information that the public does not have a right to see." "Additionally, the [Atlanta Housing Authority] may be open to added liability from lawsuits by [tenants] for invasion of privacy if a mistake is made in separating the information." Griffin-Spalding &c Authority v. WKEU, 240 Ga. 444, 447 (1978).

The Court finds that the only interest which must be balanced is that of the tenants rights of privacy, if any, and the Atlanta Housing Authority interest therein.

7.

The question of disclosure and extent of disclosure therefore narrows down to a determination of what interests, if any, do the tenants have in rights to privacy both as a matter to be balanced by the Court and as protected under Georgia Laws 1967, p 455; 1970, p 163 (Georgia Code Annotated §40-2703); Houston v. Rutledge, 237 Ga. 764, 766; Northside Realty Assoc., Inc. v. Community &c Comm., 240 Ga. 432, 435-436; Brown v. Minter, ____ Ga. _____; Opinions of the Attorney General, Op 77-56; UP 76-43; UP 74-113; Op 73-77; Op 72-148.

In Whalen v. Roe, 429 U.S. 589, 51 LEd 2d 64, 97 S.Ct. 869 (1977) holds:

> "Appellees contend that the statute invades a constitutionally protected'zone of privacy.' The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

This Court finds that under Georgia Laws 1967, p 455; 1970, p 163 (Georgia Code Annotated §40-2703) the General Assembly expressly created a zone of privacy co-extensive with such constitutional rights of privacy when it used language ". . . or to medical records and similar files, the disclosure of which would be an invasion of personal privacy." Such personal privacy is broader than the common law area of privacy protected by tort action from "invasion of privacy." Since the protection of constitutional rights; whether they arise under the United States Constitution or under the 1976 Constitution of the State of Georgia, is the paramount duty of the Courts, then such interest must override the public interest in the right to know when they come into conflict.

The common law concept of right of privacy must be examined to help in delineating the amorphous constitutional right of privacy. There are four theories of privacy or protected area of privacy from unlawful invasion. The first is the theory of intrusion upon the plaintiff's seclusion or solitude, or into his private affairs Newcomb Hotel Co. v. Corbott, 24 Ga. App. 533; 27 Ga. App. 365; Byfield v. Candler, 33 Ga. App. 275; Young v. Western & A. R. Co., 39 Ga. App. 761; McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92; Marcelli v. Teasley, 72 Ga. App. 421; Walker v. Whittle, 83 Ga. App. 445; Ford Motor Co. v. Williams, 108 Ga. App. 21 reversed on other grounds 219 Ga. 505; Cabaniss v. Hipsley, 114 Ga. App. 367, 371(1). The second is the theory of public disclosure of embarrassing private facts about the plaintiff; Bazemore v. Savannah Hospital, 171 Ga. 257; Gouldman-Taber Pontiac v. Zerbst, 213 Ga. 681; Haggard v. Shaw, 100 Ga. App. 813; Davis v. General Finance &c Corp, 80 Ga. App. 708; Waters v. Fleetwood, 212 Ga. 161. This theory has three necessary elements for recovery; (a) the disclosure of private facts must be a public disclosure; (b) the facts disclosed to the public must be private, secluded or secret facts and not public ones; (c) the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities under the circumstances. Cabaniss v. Hipsley, 114 Ga. App. 367, 372(1); Lester v. Trust Co. of Georgia, 144 Ga. App. 526, 529. The third theory is publicity which places the plaintiff in a false light in the public eye which requires falsity or fiction; McKown v. Great A&P, 99 Ga. App. 120, overruled in Ford Motor Co. v. Williams, 108 Ga. App. 21, reversed on other grounds 219 Ga. 505; Pinkerton Nat. Det. Agency v. Stevens, 108 Ga. App. 159; Meeks v. Douglas, 108 Ga. App. 424; Brown v. Colonial Stores, 110 Ga. App. 154; Goodyear Tire &c Co. v. Vandergriff, 52 Ga. App. 662; Cabaniss v. Hipsley, 114 Ga. App. 368, 375(3); Lester v. Trust Co. of Georgia, 144 Ga. App. 526, 529.

The fourth theory is the appropriation for the defendant's advantage of the plaintiff's name or likeness; Pavesich v. New England Life Ins. Co., 122 Ga. 190; Tanner-Brice Co. v. Sims, 174 Ga. 13; Waters v. Fleetwood, 212 Ga. 161; Goodyear Tire &c Co. v. Vandergriff, 52 Ga. App. 662; Cabaniss v. Hipsley, 114 Ga. App. 367, 377(4).

To establish a constitutional right of privacy does not require that each and every element of a common law right of action for an invasion of privacy be established, because the latter is a more exacting standard required for the award of money damages while the former is a less well defined area to avoid invasion. Whalen v. Roe, 429 U.S. 589, 51L.Ed. 2d 64, 97 S.Ct. 869 (1977); Op. 77-56, Op. 73-77, UP 74-113.

The Court therefore finds that some of the information sought as to the tenants falls within the constitutional and statutorily protected right of privacy and in a balancing of interests will prohibit such disclosure as to the following:

(a) tenants who prior to the filing of the lawsuit had paid all or a substantial portion of any delinquent rents;

(b) tenants who owed less than six months rent at the time of this order;

(c) information as to source of income or other personal information contained in the records as to all tenants;

(d) tenants who had failed or refused to pay rent for six months or more with a good faith, reasonable and justified grounds as determined by the Court in camera.

The question remains can the constitutional right of privacy be waived and can the statutory exclusion of right of privacy be waived. The answer is that such right of privacy is not an absolute right and as any right it can be waived expressly or impliedly by conduct contrary to the assertion of such right and where public policy demands. Whalen v. Roe, 429 U.S. 589, 51 LEd. 2d 64, 97 S.Ct. 869 (1977).

The Attorney General has rendered the opinion that financial data or other personal information furnished voluntarily or as part of an application for a license by the State is part of the public record and therefore can be obtained by the public. Op. 76-126. The reasoning here appears to be based upon a waiver by applying for the license.

Implicit to the common law right of action for invasion of privacy is the concept of waiver of such rights of privacy. By express or implicit waiver through conduct a party can waive his or her right of privacy and actually invite public intrusion upon such right of privacy by becoming a public figure. Cabaniss v. Hipsley, 124 Ga. App. 367 (1966). A person, who obligates himself to pay a debt and fails to do so, through his overt conduct waives the right of privacy to such matter by giving rise to his creditors reasonable, legal and good faith rights to collect such obligation. Gouldman-Tabor Pontiac v. Zerbst, 213 Ga. 682, 683(3) (1957); Davis v. Gen. Finance &c Thrift Corp., 80 Ga. App. 708 (1950); Haggard v. Shaw, 100 Ga. App. 813(2) (1959).

The Court finds that tenants who are delinquent six months or more in their rent to the Atlanta Housing Authority and who thereby have subjected themselves to the regular procedure for eviction have waived their constitutional and statutory right of privacy by such action. The expressed purpose of Mr. Sears' inquiry was

to root out acts of favoritism. By the showing made to the Court such acts of favoritism are the failure to follow normal Atlanta Housing Authority procedure and to begin eviction proceedings against tenants who are more than five months delinquent in rent. Therefore, the Atlanta Housing Authority must furnish the names and addresses, amounts of delinquent rent, and the delinquency period for all tenants who are delinquent six months or and have not paid all or substantially all of such delinquency prior to the filing of this suit. The public interest under such circumstances is found to require such disclosure.

The Atlanta Housing Authority is also directed to furnish the delinquent rents, periods for delinquency, and housing project location even for tenants whose name and address is ordered not to be disclosed.

9.

The Atlanta Housing Authority personnel shall make copies of each of the computer print-outs listed in Part I, paragraph 7 of the foregoing Findings of Fact. Such personnel will physically cut out the name, address, income source and all personal information pertaining to tenants falling within Part II, paragraph 7, sub-paragraphs (a), (b), (c) and (d). Such personnel will physically cut out the income source and all personal information pertaining to tenants who are delinquent in their rent six months or more except their name, address, delinquent rent, and delinquency period. After such requested records have been so prepared and inspected by Atlanta Housing Authority personnel and further inspected promptly by Jane Doe, Mary Roe and Ann Poe, or their counsel, such expurgated records shall be turned over to Mr. Edward M. Sears.

Mr. Edward M. Sears is directed to pay to the Atlanta Housing Authority the reasonable costs of the reproduction and preparation of such requested records including the hourly cost of labor. Griffin-Spalding &c Authority v. WKEU, 240 Ga. 444, 447 (1978); Georgia Code Annotated §40-2702. The costs are to be paid equally by Mr. Edward M. Sears, Jr. and the Atlanta Housing Authority, Bernard Parks, and James Hatch.

This 29 day of May, 1979.

Frank M. Eldridge

Judge Frank M. Eldridge
Fulton Superior Court
Atlanta Judicial Circuit

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

EDWARD M. SEARS, JR., Plaintiff	)	
vs.	)	CIVIL ACTION
THE ATLANTA HOUSING AUTHORITY, BERNARD PARKS, as Interim Director of the Atlanta Housing Authority; and JAMES HATCH, as Finance Director of the Atlanta Housing Authority, Defendants	)	FILE NO. C-49692
JANE DOE, MARY ROE and ANN POE, Individually and on behalf of all others similarly situated, Intervenor-Defendants	)	

O R D E R

The Intervenor-Defendants motion for Judgment on the Pleadings was filed on May 23, 1979, after the Court had prepared its Order but before the entry of said Order on May 30, 1979. Said motion for judgment on the pleadings would delay the final disposition of the case and said parties represented to the Court at the hearing when the Court permitted intervention that they were willing to submit the matter for the Court to make a final ruling at that time and the Court allowed additional time for the filing of briefs before it made its final ruling. The parties were advised and were well aware that the Court had taken the entire matter under advisement for ruling on the merits. The parties at the time the Court took the matter under advisement did not contend that there were any disputes as to fact as evidenced by the Intervenor-Defendants motion for judgment on the pleadings.

The Court hereby denies the Intervenor-Defendants' motions for judgment on the pleadings and for a new trial.

In regard to the Intervenor-Defendants' motion for an order amending its findings of fact and conclusions of law it is granted as follows:

1.

As to page 3, paragraphs 13 through 15 of the Court's Order of May 29, 1979, the Court vacates the same because said paragraphs are based upon matters objected to now and which the Court had erroneously believed that the parties had stipulated into evidence.

2.

The Court finds that Mr. Sears has alleged that he has reason to believe that tenants of the Atlanta Housing Authority may have received favors for political and other reasons which has caused the Atlanta Housing Authority to allow excessive rent delinquency to occur and the Court finds that such issue of possible favoritism in allowing rents to become delinquent, if in fact it has occurred, is of legitimate public interest and is newsworthy and can only be satisfied by an inspection of such records under order of this Court.

3.

The Court has determined that a rent delinquency of six months without any payment on the arrearage by a tenant of the Atlanta Housing Authority would reasonably give rise to the inference of favoritism if no eviction action has occurred or to the inference of poor management by the Atlanta Housing Authority, which is a matter of public interest.

4.

The Court finds that although it may be possible for the Intervenor-Defendnats to introduce evidence that there has been no favoritism, that all rent debts delinquent six or more months have a legitimate reason, that the Atlanta Housing Authority was well managed and run, and that it was normal practice for the Atlanta Housing Authority to wait beyond six

months before commencing eviction proceedings as to all delinquent tenants such evidence would be irrelevant as to whether Mr. Sears and the public may believe such acts, if they occurred, show favoritism or mismanagement and he has a right to satisfy himself as to such issue.

5.

The Court finds that there are no disputes as to material facts as to Mr. Sear's right to inspect the Atlanta Housing Authority's records and as to the Intervenor-Defendants' rights to privacy.

6.

The Court further finds that the public and Mr. Sears in particular with or without "good reason to believe that Defendant Authority was favoring certain tenants" has a right under Georgia Laws 1959, p 88 et seq., to inspect the records of the Atlanta Housing Authority as to tenants delinquent in their rent six months or more, because whatever rights of privacy, if any, said tenants have or may have had are waived and forfeited by said delinquency for six or more months without any payment or agreement to pay being made during said period of time

[illegible] and remainder of the [illegible] 1979 [illegible].

This 17 day of July, 1979.

Judge Frank M. [illegible]-Judge
Fulton Superior Court
Atlanta Judicial [illegible]

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

EDWARD M. SEARS,

Plaintiff, Appellee and Cross-Appellant, Respondent

-vs-

JANE DOE et al.,

Defendant Intervenors, Appellants and Cross-Appellee, Movants

CASES NUMBERS 35604 and 35647

On Appeal from the Superior Court of Fulton County

Civil Action No. C-49692

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

KENNETH G. LEVIN
151 Spring Street, N.W.
Atlanta, Georgia 30303
524-5811

DENNIS GOLDSTEIN
PHILLIP A. BRADLEY
1131 Capitol Avenue, S.W.
Atlanta, Georgia 30315
524-2681

ATTORNEYS FOR MOVANTS

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

EDWARD M. SEARS,	:	
	:	
Plaintiff, Appellee and Cross-Appellant, Respondent	:	CASE NOS.
	:	
-vs-	:	
	:	
JANE DOE et al.,	:	35604 and 35647
	:	
Defendant Intervenors, Appellants and Cross-Appellees, Movants	:	

MOTION FOR REHEARING

Comes now JANE DOE et al., Defendant Intervenors, Appellants in Case No. 35604, Cross-Appellees in Case No. 35647, and move this Court for a rehearing of its joint ruling in these actions dated January 3, 1980 on the following grounds:

In holding that by merely allowing their rental accounts to become unpaid when due, public housing tenants impliedly waive whatever constitutional rights to privacy they have in their rental records for purposes of disclosure of that information to the public at large, this Court has raised very serious federal constitutional questions concerning the waiver of constitutional rights. This Court's opinion overlooks the considerable body of federal law, from the United States Supreme Court and elsewhere, regarding the standards that must be spplied to determine whether or not a waiver or a constitutional right has occurred.

WHEREFORE, Intervenors pray that a rehearing in this matter be granted, that Divisions 2 and 3 of this Court's opinion be withdrawn, and that the cause be ordered remanded to the trial court for the taking of evidence on a question of whether or not any actual waiver of Intervenors' constitutional rights to privacy has occurred.

KENNETH G. LEVIN
151 Spring Street, N.W.
Atlanta, Georgia 30303
524-5811

PHILLIP A. BRADLEY

DENNIS GOLDSTEIN
1131 Capitol Avenue, S.W.
Atlanta, Georgia 30315
524-2681

ATTORNEYS FOR INTERVENORS-MOVANTS

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

EDWARD M. SEARS,	:	
Plaintiff, Appellee and Cross-Appellant, Respondent	:	CASE NOS.
-vs-	:	
JANE DOE et al.,	:	35604 and 35647
Defendant Intervenors, Appellants and Cross-Appellees, Movants	:	

BRIEF IN SUPPORT OF MOTION FOR REHEARING

A. Introduction

As earlier briefs in these appeals have shown, and as this Court here and elsewhere has recognized, the state of Georgia in particular, and the courts of this country in general, have long recognized the existence of a "right of privacy " of constitutional dimensions in favor of individual citizens. The trial court, correctly relying on the U.S. Supreme Court's decision in Whalen v. Roe, 429 U.S. 589 (1977), found that one type of interest protected by this right of privacy was "the individual interest in avoiding disclosure of personal matters," and that that interest was implicated in the instant case.[1/] The cases

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[1/]Other U.S. Supreme Court privacy cases include Carey v. Population Services International, 431 U.S. 678 (1977), and Moore v. City of East

(footnote continued on next page)

have held that it is the Due Process Clause of the 14th Amendment to the United States Constitution that protects a person's right to privacy under federal law, and Intervenors have relied upon that clause, and upon the corresponding Due Process Clause of the Georgia Constitution, Article I, Section I, Paragraph I, throughout this case, and reiterate that reliance here. As this Court has held, both the privacy questions, and the constitutional issues of waiver that are the subject of this motion, are entitled to at least as much protection under the Georgia Due Process Clause as they would be under the federal one. Pope v. City of Atlanta, 240 Ga. 177, 178 (1977).

This Court's opinion correctly assumes the existence of a constitutional right of privacy in Intervenor-tenants' rental records, but holds that that right is impliedly waived by public housing tenants at any time they fall into arrears in their rent. Because the Court's opinion holds that for purposes of Georgia's Open Records Act, public

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[1/](continued) Cleveland, 431 U.S. 494 (1977) (and see Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974)). Notable lower court decisions in the area include Plante v. Gonzalez, 575 F.2d 1119, 1135 (5th Cir., 1978) ("Privacy of personal matters is an interest in and of itself, protected constitutionally, ...") and United States v. Hudson 43 USLW 2377 (D.C. Super., 1975) (opinion by Judge Harold Greene, now of the U.S. District Court for the District of Columbia). Our own Court of Appeals has recently noted the importance of one's privacy in financial records, Borenstein v. Blumenfeld, 151 Ga. App. 420 (1979).

housing authorities are to be treated just the same as other authorities, the same conclusion would presumably apply to the hospital and insurance payment records of patients of state hospital authorities, for example. The ease with which this Court has thus found that an unsophisticated private individual may unknowingly subject himself to unrestricted public disclosure of highly personal information about himself cannot be squared with the stringent standards laid down by the United States Supreme Court for the waiver of constitutional rights. On rehearing, we ask that the Court consider and apply these constitutional standards as outlined in the next section of this brief.

B. Waiver of Constitutional Rights

The United States Supreme Court has on many occasions dealt with the standard to be applied in determining whether or not a person has waived one or more of his constitutional rights, but perhaps has nowhere more cogently articulated that standard than in Brady v. United States, where it said: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady, 397 U.S. 742, 748 (1970). Elsewhere, the Supreme Court has ruled that waiver of a constitutional right must be defined as "an intentional relinquishment or abandonment of a known right or privilege," Fay v. Noia, 372 U.S. 391, 439 (1963), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Johnson in turn cited with approval language from two earlier civil cases: "...courts indulge every reasonable presumption against waiver" of constitutional rights, Aetna Insurance Co. v. Kennedy, 301

U.S. 389, 393 (1937), and courts "do not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 307 (1937) (right to Due Process of Law). See also Barker v. Wingo, 407 U.S. 514, 525-6 (1972). These rules were explicitly applied to protect the rights of an ordinary consumer in Fuentes v. Shevin, 407 U.S. 67 (1972), and note also the important companion cases of D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174 (1972) and Swarb v. Lennox, 405 U.S. 191 (1972), involving confession of judgment clauses in contracts.

These cases make it clear that even purported written waivers of constitutional rights are often constitutionally insufficient. Surely, then, waivers that no one suggests were actually made but were merely implied must be viewed with even stricter scrutiny. These cases hold that under federal constitutional standards, a factual inquiry must be made in each individual case to determine whether or not the individual knew that he had a particular constitutional right, and, if he did, whether or not he knowingly and intelligently waived it. In the instant case, no such inquiry was even attempted. However, given the unlikelihood that many if any of the Housing Authority's tenants intended to get behind in their rent when they became tenants, common sense tells us that it is equally unlikely that any of them even considered the possibility of having their names, addresses and rental records spread before the public in the pages of the Atlanta Constitution, to say nothing of a voluntary and intelligent waiver of any objection to such publication.

Most of these cases, and their principal language, were cited and relied on by the Fifth Circuit Court of Appeals in their sensitive

opinion in Gonzalez v. County of Hidalgo, Texas, 489 F.2d 1043 (5th Cir., 1973), in which they held that the U.S. Supreme Court had "clearly indicated that a heavy burden must be borne by the party claiming that a 'voluntary, intelligent and knowing' ...waiver has occurred." 489 F.2d at 1046. It is especially noteworthy that in that and most of the other "waiver" cases, the party claiming waiver was at least relying on a written clause in a contract to which they were a party, actually purporting to waive the right in question. In the instant case Sears offers not even such a slim reed; nothing but an "implication" is relied upon. See also National Equipment Rental Ltd. v. Hendrix, 565 F.2d 258 (2nd Cir., 1977), Stamicarbon, N. V. v. American Cyanamid Co., 506 F.2d 532, 537-8 (2nd Cir., 1974), and Stewart v. Pearce, 484 F.2d 1031, 1034 (9th Cir., 1973).

The U.S. Supreme Court has also made it clear that the question of a waiver of constitutional rights is "a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966), Fay v. Noia, 372 U.S. 391, 439 (1963). Thus this Court was required to consider and apply federal constitutional law in determining the standards to be applied for such waivers. Such has not yet been done in these cases.

The various credit-waiver cases relied upon by this Court in its ruling are by no means necessarily endangered by such an analysis. None of them, of course, explicitly dealt with any constitutional right of privacy, and it is only to constitutional rights that the federal waiver standard must be applied. Perhaps equally importantly, all of them dealt with a far more limited breach of privacy that Intervenors have conceded exists even in the instant case. Specifically, they all

find implied consent for the voluntary dissemination by the creditor of information about their accounts to those specific and limited third parties who might reasonably be expected to assist the creditor in the collection of its debt. Thus, none of the Intervenor-tenants is complaining about any contacts by Atlanta Housing Authority with their employers or family members in an attempt to collect rents or charges, and very likely could not do so under existing law. Likewise, this Court has never before now suggested that a creditor could, with impunity, publish an advertisement in the Atlanta Constitution listing the names, addresses and payment records of customers it considered to be delinquent on debts to it. Even less has this Court ever suggested that the Constitution could compel an unwilling creditor to make such a publication.

This Court has justifiably articulated its concern that the Open Records Act's policy of making public records available for public inspection be meaningfully implemented. Under this ruling, a great many Atlanta Housing Authority records are now open for Sears' inspection, investigation and dissemination. However, where personal information from the individual files of particular tenants is involved, major considerations of personal privacy must also be dealt with. Under applicable federal constitutional law, they may not be overcome without a finding not of an implied, but of a "knowing and intelligent" waiver.

C. Benefits Conditioned on Waiver

This Court's ruling on waiver could also be construed to imply that although privacy rights might not easily be waived by implication in the ordinary case, it is more permissible to imply

such waivers on the part of recipients of public benefits. Stated otherwise, the argument would be that though the government could not directly require the waiver of one's right of privacy, it may condition the receipt of public benefits upon such a waiver.

If any such assumption was behind this Court's waiver ruling in this case, it would be contrary to federal constitutional law. Although some old U.S. Supreme Court cases once so held, the Supreme Court has in more recent decades decisively rejected the old premise that public benefits "may be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action." Keyishian v. Board of Regents, 385 U.S. 589, 605-6 (1967) (governmental employment; freedom of association); and see Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits; freedom of religion); Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (city employment; freedom from self-incrimination); Shelton v. Tucker, 364 U.S. 479 (1960) (state employment; freedom of association). As the U.S. Court of Appeals for the Fifth Circuit stated in Dixon v. Alabama State Bd. of Education, 294 F.2d 150, 156 (5th Cir., 1961): "...the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right" to Due Process of Law under the Fourteenth Amendment.

D. Conclusion

This Court has interpreted Georgia's Open Records Act to require the compelled dissemination to the general public of otherwise private tenants' rental records on the ground that mere rent arrearage implicitly waives such tenants' Constitutional rights to privacy. Such

an interpretation threatens to render the Act, insofar as applied to what would otherwise be privacy-protected records, unconstitutional as violative of the U.S. Supreme Court's established standards governing waivers of constitutional rights. The controlling federal cases require a particularized inquiry into the question of whether any purported waiver was knowingly and intelligently made. In order to avoid a possible unconstitutional construction of the Open Records Act, therefore, the second division of this Court's opinion should be vacated, and the matter remanded to the trial court with instructions to hold a hearing on the question of whether or not the tenant-intervenors knowingly and intelligently waived their rights to the privacy from general public access of their AHA rental records.

Respectfully submitted,

KENNETH G. LEVIN
151 Spring Street, N.W.
Atlanta, Georgia 30303
524-5811

DENNIS GOLDSTEIN

PHILLIP A. BRADLEY
1131 Capitol Avenue, S.W.
Atlanta, Georgia 30315
524-2681

ATTORNEYS FOR INTERVENORS-MOVANTS

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6393

JANE DOE, et al.,
Appellants,

v.

EDWARD M. SEARS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Albert G. Norman, Jr.
David J. Bailey
3300 First National Bank Tower
Atlanta, Georgia 30303

Counsel for Appellee
Edward M. Sears

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6393

JANE DOE, et al.,
Appellants

Vs.

EDWARD M. SEARS,
Appellee

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the appeal is not within the jurisdiction of this Court under 28 U.S.C. §1257(2) and on the further ground that the questions raised by the Appellant are so insubstantial as to need no further argument.

I.

THE STATE STATUTE INVOLVED AND
THE NATURE OF THE CASE.

A. The Statute

The Georgia Open Records Act (Ga. Laws 1967, p. 455, as amended by Ga. Laws 1970, p. 163 (Ga. Code Ann. §40-2701 et seq.)), authorizes citizens of Georgia to make a reasonable, personal inspection of "[a]ll State, County and municipal records, except those, which by order of the court of [Georgia] or by law, are prohibited from being open to inspection by the general public . . . ." (Emphasis added) The Act makes a further exception for "medical records and similar files, the disclosure of which would be an invasion of personal privacy." (Ga. Code Ann. §40-2703)

B. The Nature Of The Case

The Appellee invoked the Open Records Act in an effort to examine certain records maintained by the Atlanta Housing Authority. Those records relate to charges that Authority officials have favored unidentified tenants by permitting them to live rent-free in public housing while more deserving candidates for public subsidies have been denied housing altogether. The records identify all tenants with rent arrearages as of given points in time. By inspecting them, the Appellee will be able to learn whether in fact particular tenants had been allowed to forego their rental payments for substantial periods of time. By learning the identity of those tenants, the Appellee may determine whether excessive leniency in rent collection is practiced generally by the Authority's project managers or whether favoritism is instead confined to a specific project. Once the names of delinquent tenants are made known, it will also be possible to investigate whether those tenants have been given favors because of political or other influence with the Authority or with other branches of City Government.

When the Atlanta Housing Authority refused to let him examine the records he requested, the Appellee petitioned for a writ of mandamus. The trial court allowed the Appellant and her class to intervene after the Authority had filed an answer asserting, in part, that the constitutional rights of its tenants would be violated if the records were made available. When the trial court failed to grant the Appellee complete relief, both sides appealed. Ultimately, the Supreme Court of Georgia ruled that the requested records should be made avail-

able for inspection in their entirety. Review of that judgment has now been sought, not by petition for certiorari, but by direct appeal under 28 U.S.C. §1257(2).

II.

ARGUMENT

A. Because The Constitutionality Of The Open Records Act Was Not Challenged In The Proceedings Below, This Appeal Is Not Within The Jurisdiction Of This Court.

By the express terms of the Open Records Act, no materials as to which a constitutional right of privacy exists are subject to inspection, since all such records would, of course, be prohibited "by law" from disclosure. Ga. Code Ann. §40-2701. (Emphasis added) For that reason, the parties focused their debate in the lower courts on the nature and content of the requested records, not on the validity of the Act itself. At no time did the Appellant seek to invalidate that statute. Rather, the Appellant simply urged that, "Disclosure to [Appellee] of the records he seeks in this action would violate privacy rights secured to [the Appellant and her class] by the laws of Georgia and the Constitution of the United States." (Answer of Intervenor-Defendants, Fourth Defense) In other cases this Court has ruled that arguments framed in that manner do not question the "validity" of a state statute within the meaning of 28 U.S.C. §1257(2). Merganthaler Linotype Co. v. Davis, 251 U.S. 256, 259, 40 S.Ct. 133, 64 L.Ed. 255 (1920); Hanson v. Denckla, 357 U.S. 235, 244, 78 S.Ct. 1228, 2 L.Ed.2d 1283

(1958); Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, 65 S.Ct. 624, 89 L.Ed. 857; Rohr Aircraft Corp. v. San Diego County, 362 U.S. 628, 80 S.Ct. 1050, 4 L.Ed.2d 1002. Based on those decisions, this Court has no jurisdiction to entertain a direct appeal from the judgment below.

B. Since The Privacy Interest Which The Appellant Advocates Is Not Of Constitutional Magnitude, The Appellant's Waiver Contention Involves Nothing More Than The Appellant's Common Law Right To Privacy And Does Not Present A Substantial Federal Question.

In Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), this Court observed that two categories of privacy interests have been held worthy of constitutional protection: (1) "the interest in independence in making certain kinds of important decisions" and (2) "the individual interest in avoiding disclosure of personal matters." 429 U.S. at 599-600. As the Court acknowledged in Whalen, the first of those two categories has been limited to situations involving such matters as contraception, miscegenation, abortion, and similar family matters. The second category has not been as clearly delineated. Still, limited disclosures of personal information by the Government have not been thought to violate an individual's constitutional rights, especially where disclosure would have no adverse effect upon rights guaranteed by the First and Fourth Amendments. See O'Brien v. Digrazia, 544 F.2d 543, 545-46 (1st Cir. 1976) (observing that personal financial information has received little constitutional protection);

Tosh v. Buddy's Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973) (dissemination of arrest records to private citizens); Crain v. Krehiel, 443 F.Supp. 202, 209 (N.D. Cal. 1977) (disclosure of informant's identity); and Morris v. Danna, 411 F.Supp. 1300 (D. Minn. 1976), aff'd per curiam 547 F.2d 436 (8th Cir. 1977) (disclosure of information in welfare files).

The interest asserted in this case is simply an interest against embarrassment that might result if the Atlanta Housing Authority divulges the Appellant's name, source of income, and the amount of her unpaid rent. By according constitutional significance to that interest, the Court would constutionalize the private embarrassing facts aspect of the invasion of privacy tort. Thereafter, state officials would risk liability under 42 U.S.C. §1983 by honoring any Open Records request for information not generally known about a specific individual or group. The result would be to discourage the free flow of information about state government.

In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), this Court held that a person has no constitutional protection against the publication of false statements about the person's life. Given that decision, it follows that the far less weighty interest at stake here, the interest against the publication of true facts, does not rise to a constitutional plane. Accordingly, there is no substance to the Appellant's waiver claim, since, under the circumstances, there was no constitutional right to be waived. Any error in the lower court's holding as to waiver was therefore harmless.

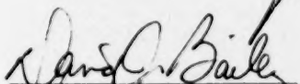
III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this appeal does not lie within the Court's appellate jurisdiction and that the question upon which this cause depends is so unsubstantial as not to need further argument. For those reasons, the Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered below by the Supreme Court of Georgia.

Respectfully submitted,

ALBERT G. NORMAN, JR.



DAVID J. BAILEY

Attorneys for Appellee,
Edward M. Sears

OF COUNSEL:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303
404/581-8000

CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for all parties in the foregoing matter with a copy of APPELLEE'S MOTION TO DISMISS OR AFFIRM, by depositing same in the United States Mail, postage pre-paid, addressed as follows:

MR. KENNETH G. LEVIN
151 Spring Street, N. W.
Atlanta, Georgia 30335

Attorney for Appellant

This 9th day of May, 1980.

ALBERT G. NORMAN, JR.
Attorney for Appellee,
Edward M. Sears

OF COUNSEL:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303
404/581-8000